

Claimant contends the Administrative Law Judge (ALJ) erred in finding that claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment. Claimant also raises an issue concerning an evidentiary ruling the ALJ made during the preliminary hearing. Claimant contends the ALJ improperly denied him the opportunity to effectively cross examine respondent's witness concerning notes that witness had made about certain conversations she had with claimant and which notes the witness had reviewed before testifying in order to refresh her recollection of those conversations and events.

Findings of Fact and Conclusions of Law

After reviewing the record and considering the arguments, the Appeals Board (Board) finds that this matter should be affirmed.

Respondent presented evidence to dispute claimant's allegations, both as to the mechanism of injury and as to when the accident occurred. Judge Clark's Order does not explain why he rejected claimant's testimony that he suffered injury to his left shoulder, upper back and neck while working under a trailer on April 19, 2001. But, the ALJ obviously relied upon the testimony of Ann McLaughlin, respondent's human resource and safety person. Ms. McLaughlin not only disputed claimant's testimony concerning a work related injury, but also provided testimony that claimant was willing to lie about his injury.

Claimant contends the Board should disregard or give less weight to the testimony of respondent's witness, Ms. McLaughlin than to claimant's testimony, because Ms. McLaughlin made notes contemporaneous with some conversations, but not others. Also, certain notes she had made to record her recollections were not disclosed to claimant's attorney. The ALJ ruled they were made in anticipation of litigation and therefore protected by the attorney work product privilege.¹

Respondent acknowledges that the notes were made before an attorney had been hired or consulted. Furthermore, it is not alleged that the notes contain opinions, theories or mental processes. The notes, however, may have been prepared in anticipation of litigation in the sense that a claim for workers compensation was anticipated.² It is not clear whether the notes were made before or after a claim was filed. It appears that the notes were not of a character routinely prepared in all cases where an employee is injured and/or seeks medical treatment. Nevertheless, it appears that they were prepared in the ordinary course of business.³ Ms. McLaughlin described her position with the respondent as "primarily safety, D.O.T. compliance and recruiting personnel, human resource type work."⁴ Her conversations with claimant and with claimant's physician were conducted in this context. Ms. McLaughlin acknowledged recording the events and conversations in order to remember them and then referred to the notes before testifying at the preliminary hearing.

¹ See K.S.A. 60-426 and K.S.A. 2001 Supp. 60-226(b)(4).

² See *Heany v. Nibbelink*, 23 Kan. App. 2d 583, 589, 932 P.2d 1046 (1997); *Klinzmann v. Beale*, 9 Kan. App. 2d 20, 670 P.2d 67 (1983).

³ *Henry Enterprises, Inc. v. Smith*, 225 Kan. 615, 592 P.2d 915 (1979); *Independent Mfg. Co. v. McGraw-Edison Co.*, 6 Kan. App. 2d 982, 637 P.2d 431 (1981).

⁴ Prel. H. Tr. at 21 (Dec. 11, 2001).

Work-product is a qualified privilege, not an absolute privilege. When a document is found to be work-product, a balancing test is applied. The party seeking production must show a need and that the information cannot be readily obtained elsewhere. This is balanced against the other party's expectation of confidentiality. The notes would, presumably, be more reliable than the witnesses' later recollections. Therefore, the extent to which Ms. McLaughlin's testimony was consistent with or varied from her notes goes directly to the question of credibility. In addition, it was respondent that first opened the area of Ms. McLaughlin's notes when it introduced Respondent's Exhibit 2, which contained Ms. McLaughlin's notes about her telephone conversation with claimant's physician.

The credibility of the witnesses is obviously critical to a determination of the compensability issues. After Ms. McLaughlin took the stand and testified on direct examination about making certain notes concerning her conversations with claimant and claimant's physician, claimant's counsel sought to have her notes for his cross-examination. Claimant argued the documents were not privileged and that the notes were necessary for a full and fair cross examination of respondent's witness, Ms. McLaughlin. On an appeal from an preliminary hearing order, however, the Board's jurisdiction is limited.⁵ Therefore, the Board does not reach the merits of this evidentiary ruling.

Based on the record as it currently exists, the Board agrees with the ALJ's determination that claimant failed to prove his injury is related to an accident at work on April 19, 2001.

WHEREFORE, it is the finding, decision, and order of the Board that the Order entered by Administrative Law Judge John D. Clark on December 12, 2001, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2002.

BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
Kurt W. Ratzlaff, Attorney for Respondent
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁵ K.S.A. 44-534a and K.S.A. 2001 Supp. 44-551.

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